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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD DOUGLAS BREIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

1. The Government asserts that the "decision of the court of appeals is correct." Brief for the United States in Opposition, at 7 (hereinafter, "Brief"). Breier vigorously disputes this conclusion and adopts by reference the arguments presented to this Court by amici curiae United States Senator James A. McClure and United States Representatives Harold Volkmer, Larry Craig, and Ron Marlenee.[1] Moreover, Breier notes that one of the three members of the panel of the court of appeals also disputed the decision of the panel and filed a strong dissenting opinion. See Appendix A, Petition for Writ of Certiorari.

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[1] Senator McClure and Representative Volkmer were the chief sponsors of the Firearms Owners Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986).

Of Senator McClure and Representative Volkmer's contentions regarding the application of the FOPA to cases such as the instant one, the contention that should be emphasized is that § 110(b) of the FOPA—which applied the amendments made by three provisions of the FOPA to proceedings "pending on the date of enactment" (not 180 days later)—simply established a different effective date for the three provisions enumerated in § 110(b). As explained by Senator McClure and Representative Volkmer, Congress intended that *all* the amendments made by the FOPA would apply to proceedings pending on the effective date of that particular amendment.[2]

2. Contrary to the Government's assertion, *United States v. Carter*, 801 F.2d 78 (2nd Cir. 1986), *cert. den.*, —— U.S. —— (1986), did not "address the issue" raised by Breier's Petition.

In the first place, *Carter* was *not*, unlike *Breier*, pending on November 15, 1986 as it was decided on September 11, 1986, two months earlier. Secondly, and more importantly, in writing that the FOPA amendment at issue in *Carter* would "not become effective until 180

[2] The Government's statement that "certain provisions of the FOPA were given retroactive application 'to any action, petition, or appellate proceeding pending on the date of enactment of this Act'" is illogical. In fact, § 110(b) gave immediate, not "retroactive," application of the three enumerated provisions to proceedings pending on the date of enactment. What the Government probably meant by the use of the word "retroactive" was that it views § 110(b) as requiring that the amendments made by the three provisions listed in § 110(b) would be the law that would apply in proceedings involving these three provisions which had commenced prior to the date of enactment of the FOPA; thus, the amendments would have retroactive effect in the sense that they would relate back to the date of the act which was at issue in the proceeding. That being the case, it follows, since § 110(b) expressly speaks only to the date of applicability, that all the other amendments made by the FOPA would also be the law that would apply in proceedings involving those provisions on their effective date: 180 days after the date of enactment.

days after enactment, i.e., November 15, 1986," the *Carter* court apparently concluded that the amendment "would not apply . . . retroactively" only because, as of the date of the court's decision, the amendment was not yet effective. Thus, *Carter* suggests that, had the case been decided *after* November 15, 1986, the court might have held that the amendment at issue *did* apply to the defendant.[3]

The primary thrust of the Government's second argument is that "the decision in this case does not conflict with the decision of the Eleventh Circuit in *United States v. Orellanes*, 809 F.2d 1526 (1987)." Brief, at 8. After reviewing the specific contentions made by Orellanes, the Government distinguishes what it refers to as the "three holdings by the court," Brief, at 9, from the language in the decision regarding the FOPA, asserting that the court "did not have to decide" the FOPA applicability issue and that the court's discussion of the FOPA was "unnecessary to the court's judgment." Brief, at 9. Thus, the Government does not in fact dispute that a genuine conflict now exists between the Ninth and Eleventh Circuits; rather, the Government attempts to show that the conflict could have been avoided by the Eleventh Circuit. That the Government believes the Eleventh Circuit "did not have to decide" the applicability of the FOPA is, however, of little moment since the Eleventh Circuit unanimously concluded that a determination of the applicability of the FOPA *was* necessary

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[3] While the Government refers to *Carter* as the "only other court of appeals to address the issue," it nonetheless also cites *United States v. Jackson*, 824 F.2d 21, 22-23, n.2 (D.C. Cir. 1987) and *United States v. Pennon*, 816 F.2d 527, 529 (10th Cir. 1987). Neither case is at all material to the instant case. In *Pennon*, the Tenth Circuit noted that the defendant did not raise the issue of the applicability of the FOPA; in *Jackson*, the court merely held that the FOPA's enactment of an enhanced penalty provision, 18 U.S.C. 924(e)(1), clarified the enhanced penalty's status as a sentencing provision.

to resolve the case. In sum, therefore, despite the Government's effort to minimize the conflict, *Orellanes is* in direct conflict with the panel majority in the instant case.

In addition to urging that *Orellanes* does not conflict with the Ninth Circuit's decision in the instant case, the Government urges that "review by this Court is unwarranted because of the diminishing importance of the issue." Brief, at 10. This assertion, however, is belied by the fact that prosecutions under the pre-FOPA Gun Control Act remain a very real possibility until November 15, 1991—over three and one half years from now—given that the statute of limitations for prosecutions under most provisions of the Gun Control Act is five years (18 U.S.C. 3282). Thus—as indeed the Government's tenacity in the instant case amply evidences—there is no reason to believe that prosecutions under the pre-FOPA Gun Control Act will not continue should this Court deny Breier's Petition. In fact, denial of Breier's Petition will send a clear message to the Government that prosecutions under the pre-FOPA Gun Control Act, except possibly in the Eleventh Circuit, should continue unabated for the next three and one half years.

3. The Government's final contention is that Breier's assertion that this Court has not established a clear analytical process for the federal courts to follow in applying the general saving provision, 1 U.S.C. 109, "is without merit." Brief, at 11. In the very next sentence, however, the Government nonetheless concedes that the "principles governing the abatement of criminal prosecutions" are only "*relatively* clear" (emphasis added) (Brief, at 11) an obvious admission that this Court has not established a sufficiently clear analytic process for the lower courts to follow in applying the general saving provisions.

In attempting to demonstrate that this Court's analytic process is sufficiently "clear" to warrant this Court's denial of Breier's Petition, the Government attempts to demonstrate that this Court's decision in *Hamm v. City*

of Rockhill, 379 U.S. 306 (1964) is consistent with this Court's prior decisions in *Hertz v. Woodman*, 218 U.S. 205 (1910) and *Great Northern Railway Company v. United States*, 208 U.S. 452 (1908). To do so, the Government, however, starts out by recognizing that in fact *Hamm did* establish a new analytical process for determining the applicability of 1 U.S.C. 109—i.e., whether an amendment to a penal statute "substitutes a right for a crime," 379 U.S. at 314—when it states that this Court's analysis in *Hamm* is "inapplicable here." Brief, at 12. Plainly, if *Hamm* were consistent with *Hertz* and *Great Northern Railway Company*, it would not be "inapplicable here"; rather, *Hamm* would be applicable but would lead to a conclusion favorable to the Government. Consequently, despite its contrary contentions, the Government recognizes that *Hamm* established a new and different analytic process from that which this Court had developed in *Hertz* and *Great Northern Railway*, a process which devolves upon the lower courts the requirement that they analyze whether an amendment to a penal statute "substitutes a right for a crime." [4]

In addition to its virtual recognition that *Hamm* created a new analytic process for applying the general saving provision, the Government completely failed to address the fact that *Hamm* also decided that the purpose of the general saving provision was "to obviate mere technical abatement . . . ." 397 U.S. at 314. The Government thus failed to demonstrate that *Hamm* was con-

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[4] It should be noted that such an analytic process would apply in the instant case since, in enacting the FOPA, the Congress expressly found that the FOPA was necessary "to correct existing firearms statutes and enforcement policies" because of "the rights of citizens . . . to keep and bear arms under the Second Amendment to the United States Constitution. . . ." § 1(b)(1). Indeed, the *Hamm* analytic process should apply more strongly in cases involving the FOPA since, unlike the Civil Rights Act of 1964—which this Court concluded, without relying on any findings of Congress, "substitut[ed] a right for a crime," and then only statutory rights —the FOPA includes an express congressional statement that its purpose was to protect constitutionally guaranteed rights.

sistent with *Hertz* and *Great Northern Railway Company*. Indeed, the Government did not make any effort to demonstrate that the "technical abatement" test—which leaves to the lower courts the determination of the question of whether an amendment to a penal statute is a "mere technical abatement"—establishes a clear guideline for the lower courts. Thus, particularly as it appears that this Court, in using the phrase "mere technical abatement," contemplated that amendments to penal statutes which made lawful conduct which was previously unlawful would not be affected by the general saving provision—an analysis inconsistent with *Hertz* and *Great Northern Railway Company*—this Court should grant Breier's Petition if for no other reason than to resolve this question.

Finally, the Government suggests that this Court's decision in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) made clear that *Hamm* "was not intended to mark a departure from the Court's traditional construction of the general saving clause . . . ." Brief, at 12. The Government, however, fails to note that *Pipefitters* did not overrule *Hamm*. As a result, the "substitutes-a-right-for-a-crime" analysis plainly retains at least some vitality. Moreover, the failure to overrule *Hamm* means that in some cases involving a non-technical amendment—i.e., an amendment that redefines what conduct is unlawful—the general saving provision would not be applicable. It should be added that the Government also failed to explain how the conclusion of *Pipefitters* that the general saving provision nullified abatement of the prosecution because the amending act "retains the *basic offense*" (emphasis added), 407 U.S. at 435, is consistent with this Court's prior decisions.[5]

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[5] Indeed, in *Pipefitters*, by inquiring whether an amendment to a penal statute "retains the basic offense," this Court not only appears to have approved *Hamm* but possibly to have created a *third* analytical process to be utilized in determining the effect of the general saving provision.

CONCLUSION

To allow Breier to benefit from Congress' recognition of the flaws of the Gun Control Act of 1968 and thus to carry out Congress' intent in enacting the FOPA, Breier's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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